the costs on that part of the claim to which the appellants had consented, should be refunded by the respondents to the appellants.

Motion granted.

Solicitors: *Drew & Napier; Chung & Co.*

WONG TECK PING v. WONG AI KING

[O.C.J. (Lee Hun Hoe J.) February 16, 1968]
[Sibu — Matrimonial Causes No. 12 of 1967]

Family Law — Divorce — Cruelty — What amounts to — Standard of proof — Matrimonial Causes Ordinance (Sarawak Cap. 94) s. 6(1)(g) and (3)(b).

This was a petition by a husband seeking divorce on ground of cruelty under section 6(1)(g) of the Matrimonial Causes Ordinance (Cap. 94). The parties were married at the Methodist Church at Sibu in 1951. There were three children of the marriage.

In support of his charge of cruelty, the petitioner adduced evidence of sixteen acts on the part of the respondent which he alleged had amounted to cruelty. Many of the incidents were not corroborated, and for everyone of them, the respondent was able to offer an explanation.

Held: (1) to constitute cruelty under section 6(1)(g) of the Matrimonial Causes Ordinance, there must be substantial physical and mental suffering. The effect of the word "substantial" is that for cruelty to be a ground for divorce, the petitioner must establish that the acts which he rely on to prove cruelty affect his health physically or mentally;

(2) the standard of proof of cruelty is similar to that in a criminal case. The onus was on the petitioner to prove cruelty beyond reasonable doubt. As the onus had not been discharged, the petition was dismissed.

Per Curiam: "the court has a discretion to dissolve the marriage under section 6(3)(b) of the Matrimonial Causes Ordinance.... Section 6(4) of the said Ordinance makes it clear that before such a discretion is exercised, the court must take into consideration how the interests of the children of the marriage or of either party will be affected if the marriage is dissolved."

Cases referred to:—

(1) *Beal* v. *Beal* [1951] P. 48 & 49.

(2) *Beard* v. *Beard* [1946] P. 8.

(3) *Richardson* v. *Richardson* [1950] P. 16.

(4) *Squire* v. *Squire* [1948] 2 All E.R. 51 & 55.

MATRIMONIAL CAUSES.

Chew Peng Cheng for the petitioner.

C. T. Wong for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: The parties were married on 26th January, 1951 according to the rites of the Methodist Church at Sungei Merah, Sibu. After the marriage they lived with the petitioner's parents for some time. Then they moved out and lived at various places until finally at 12, Raminway, Sibu. They have three children. The eldest is a girl and the two younger children are boys. Their ages are 17, 15 and 12 years respectively.

The petitioner charged the respondent with cruelty since marriage. Following an answer from respondent leave was obtained to amend paragraph 6 of the petition to the effect that there was a previous divorce proceeding in this court in 1952. In that case (Sibu High Court Civil Case No. 61 of 1952) petitioner also charged the respondent with cruelty. On 28th August, 1952 in a very brief judgment, Blagden J. dismissing the petition observed:—

"This is a sad case of two young people who should be happily married together but for some reason are not. There are undoubtedly faults on both sides but I am bound to say I think the majority of the faults lie on the wife's side."

Since then they came together again and had added two boys to the family. About sixteen years later the petitioner brings another petition against respondent and seeks to introduce incidents which were decided in 1952. I do think petitioner can do so by reason of *res judicata.* But he can adduce evidence of acts of cruelty after that period. In support of his charge of cruelty he pleaded 16 acts on the part of respondent which he alleged amounted to cruelty. Some of the allegations were abandoned as no reference was made or evidence called to support them.

The respondent denied all the charges against her and in her answer charged the petitioner with assaulting her and claimed for maintenance for herself and children. Petitioner admitted quarrelling with respondent on many occasions and assaulting her on one or two occasions. Respondent also admitted to quarrelling but denied injuring petitioner intentionally. Both admitted that every time they quarrelled they had patched up. According to petitioner the most serious incident occurred on 4th April, 1967 when respondent threw empty bottles at him and the splinters from the bottles caused cuts on him which necessitated treatment in the hospital. Since that incident petitioner had left the matrimonial home and went to live with his mother. Respondent maintained that the injuries resulted accidentally.

Respondent admitted to locking herself up in petitioner's office on one occasion. She alleged that she had done so because petitioner had not given her the monthly housekeeping money. She said that the damage to the office machinery was due to her being pushed by petitioner when the machinery fell down. On that occasion she sustained a cut on her wrist when she hit a book case.

Wong Teck Sing (P.W.6) corroborated petitioner in some incidents but he was clearly biased. First he is the younger brother of petitioner and has demonstrated in no uncertain terms his dislike for respondent. Petitioner's mother also gave evidence. She told the court how after

each quarrel petitioner would come to her and seek her sympathy. Although her dislike for respondent is not as apparent as her younger son it is clear she is not very happy with respondent's conduct towards petitioner and herself. It was said that she tried to prevent the parties' friends from affecting a reconciliation but no evidence was adduced to support it. She thought the parties behaved like children. In fact she stated she wanted to see the parties live happily together.

Of the various incidents only in two which were alleged to have occurred in 1965 were independent witnesses called to give evidence. Both incidents were concerned with the petitioner being locked up in the bedroom. Song Ing Huo (P.W.3) stated that on 30th May 1965 he went to petitioner's office at 8.30 a.m. and waited till 10.00 a.m. but petitioner did not turn up. He wanted to see petitioner about the registration of a company. Petitioner's clerk asked him to take a cheque for petitioner to sign since he was going to petitioner's house. Arriving at petitioner's house he found petitioner locked in a room and had to talk to him through the wall. He said he slipped in the cheque under the door for petitioner to sign. He said he persuaded respondent to open the door for petitioner to come out but she refused. He then left the house and came back at about noon and saw petitioner's youngest son slipping a bowl of noodle under the door. He also alleged that respondent threatened him with injuries if he should give evidence for petitioner. Respondent denied she had uttered such threat. She said P.W.3 has a grudge against her as he had on one occasion come into her bedroom and was impolite to her and she had scolded him. It has now been ascertained that 30th May 1965 was a Sunday and what P.W.3 said cannot be true. Mr. Chew submitted that the error of date should not be regarded as fatal. I cannot agree since the witness was so definite about the date. I consider his evidence suspicious and unreliable.

Tiong Leh King (P.W.5) said that some time in December, 1965 after waiting for petitioner for some two hours in his office he decided to go to petitioner's house. As he was near petitioner's flat he heard noises of quarrelling. He knocked at the door which was opened by someone. He saw petitioner and respondent standing near the door of the bedroom. He saw respondent carrying a vegetable knife in her hand. He wanted petitioner to come out but respondent prevented petitioner from doing so. Petitioner then banged the door of the bedroom. P.W.5 said that he then left and went to tell petitioner's parents about the incident. So far there is nothing in his evidence to suggest that respondent locked petitioner in the bedroom.

Hii Chang Ling (P.W.7) testified that on 4th April, 1967 he went to the petitioner's flat. Before he arrived he heard noises of quarrelling. When he went in he saw respondent sitting outside the door of the bedroom while petitioner was inside. He noticed pieces of broken vases and glasses on the table and also two other persons in the flat. He heard respondent challenging petitioner to come out. This would seem to suggest that there is some truth in what the petitioner's daughter said that her father used to lock himself in the bedroom. Otherwise why should respondent challenge petitioner to come out. Respondent denied that P.W.7 was in the house on that day and it was not true about his coming to the house to learn book keeping.

This case has lasted well over a week and it is not possible to go into all incidents in detail. In any case I do not propose to do so. One has to look at all the incidents as a whole and not individually. The respondent also charged the petitioner with assaulting her on various occasions. On each occasion after she was assaulted she was treated by Dr. Ding Siew Hua who gave evidence about the injuries. Respondent admitted that she refused on one occasion to allow petitioner to have sexual intercourse because she had had an intra uterine contraceptive device inserted and which caused her some pain. Dr. Ding said he advised her to refrain from having sexual relation with her husband for at least a week after inserting the contraceptive device. Further on two occasions in 1965 and 1966 Dr. Ding treated her for venereal disease and advised her to call her husband to come for treatment. Petitioner however had not been to see him. Respondent alleged that petitioner treated himself by self injection. This has not been denied. Neither had the petitioner denied the inference that he infected respondent with this disgusting disease.

Both parties are clearly to blame for the situation they found themselves in. It seems both are by nature jealous and bad tempered. I am prepared to say that petitioner has at least controlled the use of his strength otherwise respondent would have suffered more serious injuries. Their behaviour may be described as childish. Petitioner is being pulled by two influences one to his mother and the other to his wife. Both women are of strong character. It is very well for respondent to say that their marriage was a happy one. On the whole I would place more blame on respondent who apparently tried to control petitioner in many ways. If she is wise she would show more consideration for petitioner and confine her domestic trouble to the home and not the office. It must be humiliating for petitioner when respondent locked herself in the

office. But whether such conduct amounts to cruelty is another matter.

The question of condonation was referred to by respondent although no admission to cruelty was made. It is said that except for the incident in 1967 the parties patched up in the past whenever they quarrelled and fought. They forgave one another. Denning L.J. (as he then was) in *Beal* v. *Beal* [1] explained condonation in these words:—

"*Beard* v. *Beard* [2] and *Richardson* v. *Richardson* [3] establish the proposition that condonation is conditional forgiveness, the condition being that the guilty party should henceforth behave properly. He is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached where the guilty party has, by his good behaviour, proved himself worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, until the time may come when the proper inference is that the forgiveness is no longer conditional, but has become absolute."

Enche Chew argued that even if the past incidents might be regarded as condoned the incident in 1967 was not. He said nothing as to whether past incidents might not have been revived. He submitted that if the court is not satisfied that cruelty has been proved beyond reasonable doubt the court still has a discretion to dissolve the marriage under section 6(3)(b) of the Matrimonial Causes Ordinance (Cap. 94) which reads:—

"(3) If the court is satisfied —

(a) .....

(b) that circumstances have arisen which in the opinion of the court make it reasonable and just that the marriage should be dissolved;

the court may grant a decree of dissolution of marriage on such terms as may be just, and subject to such conditions as the court may think fit to attach."

Section 6(4) of the said Ordinance makes it clear that before such a discretion is exercised the court must take into consideration how the interests of the children of the marriage or of either party will be affected if the marriage is dissolved. The welfare of the children is of paramount consideration. All I can say is that this is not a case where I would be prepared to exercise such discretion.

The only issue is cruelty. It is not defined in the Matrimonial Causes Ordinance (Cap. 94). The word "cruel" carries with it an implication of guilt. *Halsbury's* Laws of England, 3rd Edition, page 269, paragraph 514 explains it in this way:—

"The legal conception of cruelty, which is not defined by statute, is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. To be a ground of divorce the treatment with cruelty must be treatment since the celebration of the marriage, but revelation after marriage of deception before it may be cruelty where it is aggravated by circumstances.

There is nothing in the authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim."

I would like to quote what Evershed L.J. (as he then was) said in *Squire* v. *Squire* [4]:—

"I do not attempt any definition of the words 'cruel' or 'cruelty' save to say that the conduct complained of must satisfy the ordinary acceptation of these English words, and that, on well settled authority, it must be such as to have injured, in fact, the complainant's mental or physical health or be such as to cause real apprehension of such injury."

Section 6(1) of the said Ordinance specifies various grounds on which a person may petition for divorce and ground (g) reads:—

"That respondent has since the marriage treated the petitioner with cruelty and by such cruelty has caused substantial physical and mental suffering."

Enche Wong pointed out that the said Ordinance used the word "substantial" although petitioner had sustained cuts on his thigh it was submitted that they were accidentally caused and such injuries were minor. Petitioner was able to drive to the hospital and was treated by Dr. Tiang Lee Liong (P.W.2) as an outpatient. Dr. Tiang classified the injuries as hurt. Such injuries cannot be regarded as "substantial" physical suffering. Neither is there evidence to indicate "substantial" mental suffering. I think the word "substantial" was inserted to discourage the bringing of cruelty as a ground unless a petitioner could establish that such cruelty affects his health physically or mentally. I am not saying that the combination of such charges may not in circumstances amount to "substantial" physical or mental suffering. Each case must be decided according to its peculiar facts.

It is difficult to say between the parties whom the court should believe. I take the view that both tended to exaggerate their stories in order to convince me that each was telling the truth. Both were not telling me the whole truth. It is not easy to say where the truth lies. The result is that I do not know which side to believe. The onus of proof rests upon the petitioner. The standard of proof is similar to that of a criminal case. That is to say cruelty must be proved beyond reasonable doubt. Many of the incidents stated were not corroborated. For every incident respondent was able to offer an explanation. In my judgment I cannot say that petitioner has discharged that onus. Accordingly I would dismiss his petition with costs to be taxed. Neither would I make an order for maintenance.

Petition dismissed.